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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-196

CHARLES W. LEE, JR. and RAY METCALF, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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The Government concedes in its opposition to the petition that unless the record establishes beyond a reasonable doubt *that Sights and West were clearly employees of petitioners,* then there is *no basis what-*

soever for petitioners' conviction under 18 U.S.C. § 1952 (*Rewis* v. *United States,* 401 U.S. 808).[1]

But, we respectfully submit the Government's memorandum itself simultaneously demonstrates that the record in this case *does not* contain any such proof and that, in truth and in fact, *the Government completely failed to establish any criminally sustainable employment relationship between petitioners and Sights and West at the trial.* In this regard, we point to the following:

1. At page 4 of its opposition, the Government states that the record shows petitioners, *or one of them, always paid their employees "by check on a weekly basis",* with only one exception, a diceman who worked on some weekends "off and on", and who was paid in cash. *But, there are no checks or bank records or any other evidence, oral or written,* to show that petitioners ever paid Sights and West anything—*either by check or in cash.*

2. At page 4 of its opposition, the Government states that petitioners furnished *all* of their employees *"W-2 tax forms each year",* with the exception of the one employee mentioned above, who only worked part time on some weekends for cash. *But, there are no "W-2 tax forms" in the record for either Sights or West and there is not a scintilla of evidence even to suggest that Sights and West received any compensation, taxable or otherwise, from petitioners or either of them.*

3. At page 4 of its opposition, the Government concedes that petitioners were *not* the sole owners and operators of the gambling enterprise here

[1] Indeed, in its Bill of Particulars in this case, the Government unqualifiedly undertook to prove that "Defendants Metcalf and Lee *employed* defendants Sights and West" (R. 125, 126).

involved—rather it admits that two others, Hollingsworth and Simpkins, conducted a gambling enterprise of their own in the same premises and that they (Hollingsworth and Simpkins) retained ⅔ of the profits of that operation. *Hollingsworth and Simpkins were never indicted by the Government, so there is nothing in the record before the Court to indicate what relationship they may have had with Sights and West or to what extent they were responsible for Sights' and West's actions when they were observed by federal agents and other gambling patrons on the premises.*

4. At page 3 of its opposition, the Government admits that prior to petitioners' arrest, "agents had conducted *extensive surveillance* of the gambling room and . . . of Sights and West", who, the Government states, were "*suspected employees of the enterprise*". But, with all of that "*extensive surveillance*", the Government was unable to produce a single piece of paper or a single word of testimony to suggest that Sights and West were "*actual employees*" of petitioners or either of them, or that petitioners ever compensated Sights or West or either of them for any alleged employment services.

Thus, after all of the said "surveillance" and after the trial itself, the Government's case ended where it started—with a record which showed Sights and West to be at the very best "*two suspected employees*", *not* in any respect "*proved employees*" of the petitioners. Indeed, as demonstrated in the petition for certiorari, the record really establishes that Sights and West frequented petitioners' establishment and other gambling places in Indiana as customers or patrons, not as employees.

Clearly, therefore, any fair application of the reasoning of this Court's opinion in *Rewis* v. *United*

States, supra, requires that certiorari be granted in this instance and that petitioners' convictions be set aside.

In any event, it is perfectly clear from the Government's opposition, that the convictions in this case are based not on one, but *on two successive inferences* or *presumptions* only. There was *no actual proof* of any employment relationship between petitioners and Sights and West, *so the jury was permitted to infer or to presume that such a relationship existed (Government's Opposition,* pg. 5); and having made that presumption, *the jury was then permitted to use it as a foundation for a second inference, to wit, that, as presumed employers; petitioners must also be presumed to have knowledge of their presumed employees' interstate travel* (Government's Opposition, pg. 5).

Again, therefore, we urge the Court to review this case and to strike down as unconstitutional these very oppressive felony convictions obtained by the Government without any real proof of any kind, and solely on the basis of a succession of arbitrary and irrational inferences and presumptions (*Leary* v. *United States,* 395 U.S. 6 (1969); *Turner* v. *United States,* 396 U.S. 398 (1970); *United States* v. *Barnes,* CCA, 6, 1967, 383 F.2d 287, 291; *Twitchell* v. *United States,* CCA 9, 1963, 313 F.2d 425).

CONCLUSION

On the basis of the record before this Court, certiorari should be granted to review the extent to which the Interstate Travel Act is being perverted by the Government to obtain unconstitutional convictions in unconsequential, local gambling cases which have no

suggested relationship of any kind to organized, interstate crime—such convictions being exclusively the result of pyramided inferences and presumptions rather than sustainable evidence.

Respectfully submitted,

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